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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH R. FORTNER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the military judge erred to the substantial prejudice of the petitioner by permitting, over defense objection, trial counsel to introduce evidence regarding a post-polygraph interview of petitioner, the clear import of the evidence being that petitioner had undergone and "failed" an OSI polygraph.

2. Whether the method of appointing military officers to duty as trial and appellate judges violates the appointments clause of the Constitution and the lack of any fixed term for those judicial offices violates the due process clause of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joseph R. Fortner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on August 18, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 37 MJ 349 (CMA 1993) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on March 11, 1992 is reported at 34 MJ 836 (AFCMR 1992) (Appendix B).

JURISDICTION

The final opinion of the United States Court of Military Appeals was entered on August 18, 1993. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of the law . . .

STATEMENT OF THE CASE

At the time of the offenses of which petitioner was convicted, petitioner was staying at his brother's house in Denver, Colorado. (R. 130). Petitioner, along with other relatives of petitioner's brother's wife had gathered at the house in an effort to provide moral support to petitioner's brother's wife, who was in Fitzsimmons Army Medical Center suffering from leukemia. (R. 40). Present in the house were petitioner; petitioner's brother, Sergeant First Class John Fortner; SFC Fortner's 15 year old daughter—Lisa; petitioner's cousin, Billy Makin; petitioner's mother; and two brothers of petitioner's sister-in-law. (R. 42).

Lisa, the minor with whom the offenses were alleged to have been committed, is a teenager who has a history of trouble with her parents. (R. 58). This trouble included running away from home (R. 58); use of various illegal drugs, to include marijuana, cocaine and LSD (R. 76-77); lying (R. 77); stealing and forging her parents' checks (R. 60); and, in collaboration with a boyfriend, theft of her parents' car. (R. 60). In her testimony at trial, Lisa was unable to provide any details regarding the acts, except that petitioner and she had

engaged in sexual intercourse. (R. 49). She was unable to testify regarding whether petitioner had undressed her or if petitioner had in any way touched her except during intercourse. (R. 47-48). Lisa's testimony regarding the details of who was in the house at the time of the incidents and how she had gone downstairs on the evening of the second offense, were contradicted by petitioner and other witnesses. (R. 72 and 170). Lisa did not allege the conduct by petitioner until a month after the date the offenses were to have occurred. (R 59). No medical evidence regarding the offense was available. At the time Lisa made her report she was in trouble with her parents for running away again and for stealing her parents' car and checkbook as well as for forging a check. (R. 61). Following her report of the petitioner's acts, Lisa's relationship with her father improved. (R. 61).

On 21-22 February 1990, the petitioner was tried by general court-martial at Mather AFB, California. At trial, the prosecution introduced the testimony of a psychiatrist, who testified that Lisa was suffering from post traumatic stress disorder. (R. 84-85). The doctor also opined that Lisa had been molested as a small child. (R. 89). In contrast to Lisa's allegations, petitioner has steadfastly maintained his innocence before, during and after his conviction. The only real contention to the contrary, offered by the prosecution, is a statement made by petitioner to his 20 year old cousin, Billy Makin, prior to the dates the offenses were to have occurred. The statement *was* made by petitioner, after being informed by Makin that Makin had engaged in sexual intercourse with Lisa. Petitioner said, in an effort to lighten the situation and relieve some of his cousin's obvious guilt, "what if I told you that I did too." (R. 99). Petitioner then added, after observing Makin's response to the comment, "I'm just kidding, just joking." (R. 99). Petitioner explained both the intent and context of the statement during his direct testimony. (R. 136).

During cross-examination of petitioner, trial counsel asked petitioner about a post-polygraph interview. (R. 164). While defense counsel objected to any mention of such a session, the military judge, giving defense counsel the opportunity to renew the objection later, ultimately overruled the objection. (R. 164). Trial counsel then elicited from petitioner that the OSI agent in the post-polygraph interview told petitioner that "maybe it was time to tell your [petitioner's] attorneys the truth." (R. 165). Petitioner then corrected the statement by saying that the agent's exact words were "I think you should go back and tell your attorney the truth." (R. 165). Defense counsel again objected to the entire line of questioning, even if the specific words of petitioner were not "necessarily incriminating." (R. 165). The military judge opined that the evidence was admissible and overruled the objection. (R. 165).

Contrary to his pleas, petitioner was found guilty of two specifications of carnal knowledge with his niece, a female under 16 years of age, in violation of Article 120, Uniform Code of Military Justice [hereinafter cited as UCMJ]. He was sentenced to a bad conduct discharge, confinement for 12 months, forfeiture of $400.00 per month for 12 months and reduction to the lowest enlisted grade (E-1). The convening authority approved the sentence as adjudged on 26 March 1990.

On 11 March 1992 the Air Force Court of Military Review affirmed the finding of guilty as to specification 1 but found the evidence factually insufficient to support a finding of guilty as to the remaining carnal knowledge specification. (Appendix B). As a result, the Court set aside the finding of guilty and dismissed specification 2 of the Charge. The Court then reassessed the sentence approving only so much of the sentence as provides for a bad conduct discharge, confinement for one year, and reduction to E-1. Petitioner then submitted a Peti-

tion for Grant of Review with the United States Court of Military Appeals asserting one issue of error. On October 2, 1992, that Court granted petitioner's Petition and ordered the submission of additional briefs. After hearing oral argument, the Court of Military Appeals affirmed the lower court's decision. (Appendix A).

With respect to the second question, this petition incorporates essentially the same brief which was submitted by United States Navy counsel in *Weiss v. United States*, No. 92-1482, and by United States Army counsel in *Barkley v. United States*, No. 92-1646, and *Doucette v. United States*, No. 93-68. Like *Weiss*, this petition raises two closely related questions (merged here into Question 2) which go to the heart of judicial independence for military trial and appellate judges, almost all of whom are commissioned officers and lawyers on active duty. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed for fixed terms.

Instead, military judges are selected and appointed by the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General determines. The decision to select, transfer and reassign officers to and from their judicial duties is absolute and discretionary. In other words, those judges lack any protection from being removed and/or reassigned in the event the Judge Advocate General is not satisfied with their opinions, rulings or service.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in

the American legal tradition. *United States v. Graf*, 35 MJ 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." UCMJ Art. 48, 10 USC § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal sentencing guidelines. *See United States v. Brown*, 28 MJ 470, 474 n.3 (CMA 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 MJ 216 (CMA 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review." *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence. . . . as it finds correct in law and fact . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." UCMJ Art. 66(c), 10 USC § 866(c) (1988).

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioner's claims with respect to judicial appointment and tenure. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 MJ 450 (CMA 1992).[1] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss' Appoint-

[1] A petition for writ of certiorari in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the due process issue.

ments Clause argument and affirmed the Navy-Marine Corps Court's decision. *United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, 103 S. Ct. 2412 (May 24, 1993).

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 US 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 US 11 (1955), and *Palmore v. United States*, 411 US 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precluded fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C., area, or for courts-martial that are held in peacetime.

REASONS FOR GRANTING THE WRIT

I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF PETITIONER BY PERMITTING, OVER DEFENSE OBJECTION, TRIAL COUNSEL TO INTRODUCE EVIDENCE REGARDING A POST-POLYGRAPH INTERVIEW OF PETITIONER, THE CLEAR IMPORT OF THE EVIDENCE BEING THAT PETITIONER HAD UNDERGONE AND "FAILED" AN OSI POLYGRAPH

At trial, the critical issue was whether the carnal knowledge ever occurred. Lisa said that it did, (R. 49), and petitioner denied that the conduct ever occurred. (R. 135 and 139).

Since there were no witnesses to the alleged conduct, everything came down to the credibility conflict between the prosecutrix and petitioner. During cross examination of petitioner, trial counsel obliquely introduced information regarding an OSI polygraph taken by petitioner.[2] No foundation was laid for this test, nor was any further information regarding the polygrapher or the instrument itself ever introduced.

In *United States v. Gipson* 24 MJ 246 (CMA 1987), this Court addressed the uses of polygraphs in courts-martial and ruled that polygraph results were not *per se* inadmissible. In *United States v. West*, 27 MJ 223 (CMA 1988), the Court explained that its earlier decision did not mean that polygraph results were *per se* admissible. Instead, "polygraph results must be evaluated under the entire spectrum of evidentiary rules." *Id.*, at 225. Under the facts of the instant case there was no evaluation of the reliability of the test nor its results. Thus, no foundation was ever set forth regarding the polygraph conducted upon petitioner. Perhaps, this is because rather than trying to introduce the polygraph and the polygrapher's interpretation of the test results, trial counsel referred to the ultimate conclusion reached by the polygrapher and needed nothing else.

In *United States v. McKinnie*, 29 MJ 825 (ACMR 1989), the Army Court of Review opined that the admissibility of polygraph results turns upon whether the evidence is relevant and whether it is helpful to the factfinder and whether its probative value is substantially outweighed by its prejudicial effect. The problem in the case *sub judice* is that no informa-

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[2] The petitioner was arraigned on 21 February 1990, prior to the effective date of the promulgation of Mil. R. Evid. 707 (6 July 1991) which provides that results of polygraph examinations are inadmissible in courts-martial in any way. It is arguable, however, that this case provides one of the specific scenarios the drafters sought to rectify by enforcing a total ban on the use of polygraph results.

tion of any type was ever introduced regarding the polygraph itself. Instead, the evidence was the single statement by the polygrapher during the postpolygraph interview. Thus, no findings were made by the military judge regarding any of the criteria supporting admissibility of the polygraph results. *See, Gipson,* 255 (Evertt, C.J. concurring) ("Obviously the training, experience, and skill of the polygrapher must be taken into account by the judge."). In other words, we are left with the naked, untested, and untestable, clearly evident, assertion that petitioner lied to his attorney at the time of the polygraph and was lying on the stand when he denied that the acts in question ever occurred. This conclusion clearly violates the limitation that "[a]t best, the expert [or someone conveying information arrived at by the expert] can opine whether the examinee was being truthful or deceptive in making a particular assertion *at the time of the polygraph exam.*" *Gipson,* at 253 (emphasis in original).

As the above recited facts clearly indicate, trial counsel was permitted to introduce, over defense objection, evidence regarding a post-trial polygraph interview, which reveals that an OSI polygraph was conducted on the petitioner. The real prejudice from this revelation lies in the combination of the existence of the polygraph and the statement of the OSI agent that petitioner should tell his attorneys the truth. The only conclusion to be drawn from this combination is that petitioner had failed an OSI polygraph. This revelation and the prejudice flowing from it is not mitigated by trial defense counsel's assertion that the statement by petitioner was not necessarily incriminating. The incriminating evidence, and the source of the prejudicial error, is the combination of the existence of the polygraph and the OSI agent's comment for which there is no other reasonable interpretation than the petitioner's test resulted in a finding of deception indicated.

The concept of subtly introducing the unfavorable results of a polygraph is hardly new. In *United States v. Miller,* 874 F.2d

1255 (9th Cir. 1989), the Court rooted out the fact that the prosecutor asked a polygrapher about the questions and answers to indirectly show the result of the exam. Furthermore, the Court divined that "[t]he operative fact the government sought to establish through the polygraph evidence was that Miller's admissions were reliable because he decided to make them only after being told that he had failed the polygraph." *Miller,* 874 F.2d at 1262. This is strikingly similar to the case at bar where the government counsel sought to impermissibly tip the balance of the credibility scales by introducing the *polygrapher's* statements through the cross-examination of the petitioner.

The prejudice resulting from the receipt of this evidence by the military judge, who stated "I think it's admissible," is obvious given the nature of the credibility contest in this trial. (R. 165). There was no corroboration of Lisa's claims: no physical evidence; a month between the date the incident was to have occurred and the date that she reported it; and a motive to lie, found in the attempt to improve her standing with her father and diverting attention from herself after stealing the car and checks and forging a check. It cannot be said that the erroneous admission of the polygraph results, via the questions of trial counsel, were harmless. Furthermore, under the standards announced in *Gibson, supra, West, supra,* and *United States v. Abeyta,* 25 MJ 97 (CMA 1987), the military judge's admission of the polygraph results, even by the back door as was effected here, is clearly erroneous and constituted an abuse of discretion. *See, United States v. Travers,* 25 MJ 61 (CMA 1987) (The challenged action must be found to be, *inter alia,* clearly unreasonable, clearly erroneous or without evidentiary support. *Id.,* at 63).

Despite the state of the evidence, the Court of Appeals felt that the evidence was too attenuated to show prejudice in a judge alone trial.

> Suffice it to say, we are supremely confident that the military judge engaged in no such farfetched speculation and that he paid no heed whatever to any supposed implication in the polygrapher's hearsay statement to appellant. We are equally confident that no plain error or prejudice occurred here.

United States v. Fortner, 37 MJ 349, 351 (CMA 1993). Of course, as this Honorable Court has opined,

> [t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Valenzuela-Bernal, 458 US 869, 868 (1982) (quoting *United States v. Agurs,* 427 US 97, 112-3 (1976)). As already noted, one of the specifications petitioner was convicted of was dismissed for being factually insufficient. There was an intense credibility battle going on, with plenty of ammunition on the petitioner's side. To dismiss the petitioner's claim simply because the prejudice occurred in a judge-alone trial is not consistent with this Honorable Court's injunction to reexamine the entire record and to do so with the mindset that the validity of one conviction of carnal knowledge had *already been dismissed* because it was not fully supported by the facts—the same facts which underlay the conviction now being examined. Even evidence of "relatively minor importance" must be given complete and proper weight. The decision of the Court below does not indicate such review was undertaken. As such, it is critical to due process to reexamine this case and grant review of the decision below.

II. THE METHOD OF APPOINTING MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

This petition, like *United States v. Weiss,* seeks to establish minimum standards for the appointment of military judges and their retention in office for fixed terms. It does not seek to have the Uniform Code of Military Justice or the military justice mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment, are available to those who are tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violations would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every just system requires.

A. The Appointments Clause Violation

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. US Const. Art. II, § 2, Cl. 2, *Freytag v. Commissioner,* 111 S. Ct. 2631 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo,* 424 US 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford

and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers must be made by one of the authorities set forth in that clause.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who serve in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, write the annual fitness reports of the members of each service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the due process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

B. The Due Process Violation

The reasons the Court should grant review on this question are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two issues presented in this question arise under different

constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military judges, yet he is also responsible for supervising the efficient working of the military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 US 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioner believes that respect for state legislative judgments and concerns of federalism, which loomed so large in *Medina*, have no place where federal due process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other claimed protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and

virtually undetectable chilling influences of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility to involuntary early retirement for all military judges.

The Court below has failed to justify this massive exception to the generally accepted principle of American jurisprudence that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for an accused, as reflected in such due process cases as *Tumey v. Ohio*, 274 US 510 (1927), and in the nearly universal fact that state judges serve for fixed terms of office.

CONCLUSION

The petitioner's case is a worthy one for a grant of certiorari. Review of this case is crucial because it strikes at the heart of our adversarial system of justice: do we hold the prosecutorial arm of our system to their high burden of fundamental fairness, or do we reward the trial counsel's tactics of "shoe-horning" the results of the polygraph into evidence before the members. The failure of the military judge to disallow such a tactic is error which amounts to a clear abuse of discretion. This error was not harmless as the Court of Military Appeals reasoned, because of the tenuous nature of the evidence of this case. It is especially critical where it tipped the scales of credibility enough to account for the petitioner's sole remaining conviction. Surely, this Honorable Court does not wish to condone this type of activity. This case provides an excellent opportunity to redefine the parameters of governmental conduct within the military justice system, and to

reaffirm the basic tenets of fundamental fairness which are crucial to *any* respected judicial system.

Respectfully submitted,

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